IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 13.03.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

S.A.No.724 of 1997

1.Jeyapal (D1)

2.Minor Jegannathan (D3)
rep by his father Jeyapal ..Appellants/Defendants 1 & 3

Vs.

1.Veerappan (1st Plaintiff)
2.Balakrishnan (2nd Plaintiff)
3.Sivakumar (3rd Plaintiff)
4.Jeyammorthy (4th Plaintiff)
5.Thangaraj (5th Plaintiff)
6.Neelavathy (6th Plaintiff)
7.Sornammal (7th Plaintiff)
8.Krishnamoorthy (D2) .. Respondents/Plaintiffs & 2nd Defendant

R8 given up in the Second Appeal

Prayer: This second appeal has been preferred against the decree and Judgment dated 12.2.1997, in A.S.No.39 of 1994 passed by the Principal Subordinate Judge, Cuddalore, confirming the decree and judgment dated 29.11.1993 in O.S.No.183 of 1991 on the file of the Additional District Munsif, Cuddalore.

For Appellant : Mr.Hema Sampath, Senior Counsel,
for Mrs.R.Meenal
For Respondents : Mr.P.Mativanan (For R1 to R7)
R8 givenup

JUDGMENT

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This appeal has been preferred against the decree and judgment in A.S.No.39 of 1994 on the file of the Court of Principal Subordinate Judge, Cuddalore dated 12.2.1997. The defendant 1 & 3, who have lost the defence before the Courts below, are the appellants herein.

2. The averments in the plaint relevant for the purpose of deciding this appeal in brief are as follows:-

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2(a) One Govdinda Koundar, Sanjivaraya Koundar and Thandavaraya Koundar were brothers. They owned dry lands measuring 1 acre 28 cents and during their lifetime they divided the said property equally and thus Snajivaraya Koundar got the middle 1/3rd towards his share. Out of the above said three persons Govinda Koundar died leaving behind one Subbaraya Koundar and Kasi Koundar as his sons. Sanjivaraya Koundar had two wives viz. Sornammal and Muniammal. The plaintiffs 1 to 3 are the sons born to Sornammal who is 7th plaintiff. The plaintiffs 4 to 6 and one Kirshnammal are the children born to Muniammal, who died about 3 years back.

2(b) The said middle 1/3rd share out of 1.28 cents, i.e., the middle 42 2/3 cents, was being enjoyed by the said Sanjivaraya Koundar and his sons as their joint family property. Out of the same they sold the northern 21 3/8 cents in favour of one Subramania Koundar under a registered sale deed dated 11.5.1972 to which the said Sanjiviraya Koundar and his sons viz. Veerappa Koundar, Sivakumar, Jayamurthi and Krishnamurthi, who are plaintiffs 1, 3 and 4 and 2nd defendant respectively, were parties. The 2nd plaintiff Balakirshnan did not join as he was an in-patient then in the C.M.C. Vellore. The 5th plaintiff was not born then. The remaining extent ie. The southern 21 1/3 cents out of the middle 42 2/3 cents is the suit property in this suit. This said property belongs to the joint family of Sanjivaraya Koundar and his sons and each are entitled to 1/7th share.

2(c) The said Sanjivaraya Koundar died on 17.11.1990 intestate leaving behind his first wife Sornammal and his children, the other plaintiffs, to succeed to his interest, which is 1/7th of the suit property. The remaining extent belong to plaintiffs 1 to 5 and 2nd defendant and they are in joint possession and enjoyment of the suit property.

2(d) The 1st defendant is now attempting to take forcible possession of the suit property from the plaintiffs claiming to have purchased the entire property on 31.01.1991. He seems to put forward false title under 2nd defendant. The 2nd defendant is only a co-sharer and he is not entitled to dispose of the entire property. The plaintiffs deny the truth, validity and due attestation of the sale deed in favour of the 1st defendant. Even if it is true, it is not valid and it cannot convey title to the entire property to the 1st defendant. At best, as a purchaser from a coparcenar, he has to file a suit for partition. He is not entitled to take forcible possession of the suit property which he is trying to do from the first week of February 1991. So this suit is laid for declaration that the suit property belongs to plaintiffs and 2nd defendant comprising a joint family and for injunction restraining the 1st defendant from interfering with their possession.

3. The 1st defendant in his written statement would contend as follows:-

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The 1st defendant has no interest in respect of the suit property. The 1st defendant is not a necessary party to the suit. Govinda Koundar, Sanjivaraya Kounder and Thandavaraya Koundar are the brothers. Sanjivaraya Kounder was allotted 0.42 cents. The 1st defendant is not aware of the sale deed executed by the Sanjivaraya Koundar and 4 others in favour of Subramaniya Koundar on 11.5.1972. The remaining 21 3/8 cents belongs to Sanjivaraya Koundar alone. Sanjivaraya Koundar had planted 20 coconut saplings in the suit land. Plaintiffs 1 to 3 are the children of Sanjivaraya Koundar born through his first wife Sornammal and D4 to D6 and D2 are the children of Sanjivaraya Kounder born through his second wife Muniyammal. The minor son of the 1st defendant viz. Jegannathan had purchased the remaining 21 ½ cent from his father. The old patta number for the said property is 176 for which the new patta number is 172. The 1st defendant is in possession and enjoyment of the suit property on the basis of his sale deed. The plaintiffs have no right or title in respect of the suit property. Hence, the suit is liable to be dismissed.

4. The 3nd defendant in his written statement would contend that the three brothers Govinda Koundar, Sanjivaraya Koundar & Thandavaraya Koundar are entitled to 1 acre 28 cents in Dry S.No.202. In the division 42 cents were allotted to the share of Sanjivaraya Koundar. The 3rd defendant denies the validity of the sale deed dated 11.5.1972 in favour of Subramaniya Koundar. Sanjivaraya Goundar was entitled to 21 3/8 cents alone with 20 coconut plants. Sanjivaraya Koundar's two wives are Sornammal and Muniyammal. Through Sornammal, plaintiffs 1 to 3 were born to Sanjivaraya Koundar. Defendants 4 to 6 & 2 are issues through the second wife. As early as on 10.2.1989 Sanjivaraya Koundar executed a settlement deed in favour of his son D2 in respect of 0.21 ½ cents. The said deed was duly executed and valid and acted upon. In pursuance of the settlement deed, he took possession and was in enjoyment of the same with the help of his vendor. In his turn he sold the said property in favour of Danush under a registered sale deed dated 15.2.1990 along with 20 coconuts trees. In pursuance of the sale deed, he took possession and enjoyment of the same under the registered sale deed dated 3.1.1991 for a valuable consideration. The 3rd defendant is in possession through his vendor. The old survey number for the suit property is 202 corresponding to new survey numbers 56/1 to 56/4. The old patta number for the suit property is 176 corresponding to new patta number 172 which comprise in new survey numbers 56/1 to 56/4. The plaintiffs have not title to the suit property. Hence, the suit is liable to the dismissed.

5. The plaintiffs have filed a reply statement repudiating the contentions of the defendants.

6. On the above pleading the trial court has framed four issues for trial. The 1st plaintiff has examined himself as P.W.1 and marked Ex.A.1 to A.6. The 1st defendant has examined himself as D.W.1 besides examining his vendor Danush as D.W.2. Exhibits Ex.B.1 to Ex.B.5 were marked on the side

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of the defendants. After going through the oral and documentary evidence the learned trial judge has decreed the suit as prayed for with costs. Aggrieved by the findings of the learned trial judge, the defendants 1 & 3 have preferred an appeal in A.S.No.39/1994 before the Subordinate Judge, Cuddalore. The learned Subordinate Judge, after due consideration for the rival submissions made by the appellants as well as the respondents, has ultimately come to the conclusion that the appellants/defedants 1 & 3, have no merit in the appeal and consequently dismissed the appeal confirming the decree and judgment of the trial Court. Doubly aggrieved by the findings of the Courts below the defendants 1 & 3 have preferred this second appeal.

7. The substantial questions of law involved in this second appeal are as follows:-

"a) Whether in law have not the Courts below erred in overlooking that a suit for declaration in respect of co-parcenery property is not maintainable and that the plaintiff ought to have filed a suit for partition as even according to them the suit property is the undivided joint family property of Sanjeeviraya Kounder and his sons?

b) Whether in law have not the courts below failed to see that the plaintiffs ought to have sought for setting aside the sale deed Ex.B.4 and in that event the suits should have been valued under Section 40 of T.N.C.F and S.V.Act, 1955 and the District Munsif's Court would have not pecuniary jurisdiction and consequently the decree is a nullity?

c) Whether in law is not the findings of the lower Appellate Court that the settlement deed can be revoked overlooking the mandatory provisions of Section 126 of Transfer of Property Act, vitiated?

d) Whether in law are the Courts below right in granting a decree for declaration and permanent injunction in favour of one c0-owner against another co-owner?

8. The points:-

8(a) The only point to be decided in this appeal is whether the suit property is a property purchased under the joint exertion of the three brothers Govinda Koundar, Sanjivaraya Koundar and Thandvaraya Koundar or the suit property is a joint family property of the plaintiffs and D2. The suit property is 21 1/3 cents in Nallappareddipalayam village. According to the plaintiffs, the entire suit survey number property was purchased by Govinda Koundar under Ex.B.1 dated 14.8.1940.

8(b) The learned counsel for the appellants would contend that both the Courts below have erroneously held that the suit property is a joint family property of Sanjivaraya Koundar and his sons Plaintiffs 1 to 6 and D2. The learned counsel for the appellants would rely on the evidence of P.W.1 for this purpose. P.W.1 in the cross-examination would admit that out of the joint exertion of three brothers viz. Govinda

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Koundr, Sanjivaraya Koundar and Thandavaraya Koundar, the suit survey number property measuring 1 acre 28 cents was purchased under Ex.B.1 sale deed dated 14.8.1940. P.W.1 would categorically admit that apart from 1 acre 28 cents the above said brothers or their father had no property. According to P.W.1 his father Sanjivaraya Koundar and his uncles Govinda Koundar and Thandavaraya Koundar were in Burma and they came to India in the year 1940 and they took lease of the land belonging to the others and from their earnings jointly purchased Ex.B.1 property i.e, the suit property in the name of Govinda Koundar and that the brothers have partitioned the entire extent of 1 acre 28 cents purchased by them under Ex.B.1 orally and that in the oral partition his father Sanjivaraya Koundar got 42 2/3 cents towards his 1/3 share in the middle portion and subsequent to the partition Sanjivaraya Koundar was in possession and enjoyment of his 1/3 share of 42 2/3 cents and had executed a sale deed Ex.A.1 dated 11.5.1972 in respect of only half of the said 42 2/3 cents ie. 21 1/3 cents. Sanjivaraya Koundar had also executed a settlement deed in respect of the remaining one half of his 1/3 share i.e, 21 1/3 cents in favour of D2 under Ex.B.5 dated 10.2.1989.

8(c) The learned counsel for the appellants would contend that since the plaint survey number property was not purchased from out of the income derived from the joint family property of the above said three brothers, the plaintiffs who are the sons of Sanjivaraya Koundar through his first wife viz. the 7th plaintiff-Sornammal and also his second wife Muniammal (Plaintiffs 4 to 6 and D2) cannot claim the relief of declaration of title in respect of the plaint schedule property. In support of this contention the learned counsel for the appellants would rely on AIR 1991 ORISSA 332 (Chetti Balakrishnamma Vs. Chetti Chandrasekhar Rao). The short facts in the above said dictum are as follows:-

> "The suit is filed for partition of the plaint schedule property. The plaintiff claimed right through a registered sale deed executed by his grand-father Chetti Venktaswamy in 1953 (Ext.43). One Sarthi had two sons, Venkataswamy and Narasimhulu. Venkatswamy died on 5.5.1957 leaving his widow Ammalyamma and two sons Krishnamurthy and Balakrishna (defendants 4 & 6 respectively) and daughter Sundaramma (Defendant 8). krishnamurthy's wife is Anusuya (defendant 5) and Balakrishna's son is Jaganndha (defendant 7). Krishnamurthy's son Chandarsekhar is the plaintiff and the three daughters Suguna, Geeta and Vanaja are defendants 1, 2 and 3 respectively. Narasimbulu died on 24.4.1952 leaving three wives, Narasammal, Sundaramma andManikyamma who were issueless. According to the plaintiff's case, Venkataswamy and Narasimhulu had a business of selling country cigar and out of the money thus earned lots of properties were acquired. After death of Narasimhulu in 1952, his three widows filed suits for partition which were ultimately disposed of on compromise and in the said compromise Venkataswamy got 10 annas share and the three widows

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got six annas share. Venkataswamy had executed a registered will on 20.4.1953 disposing of his properties in a particular manner. Venkataswamy died on 5.5.1957. The plaintiff was born on 3.10.1961. Under the will all lands in village Matiapalli would vest with Sundaramma after the death of Venkataswamy and the remaining properties would be enjoyed by Ammayamma but she had no power of alienation. After the death of Ammayamma half of the properties would go to Balakrishna and rest half would devolve upon the children of Krishnamurty and the sons of Krishnamurty would receive 10/16th share after the death of Ammayamma. Therefore, under the will, Krishnamurty was excluded from getting any interest in the property of Venkataswamy. Notwithstanding the aforesaid will, on 17.9.1961, a family arrangement was entered into which is Ext.1 and under the family arrangement, the members of Krishnamurthy's family, namely defendant No.4, defendant 5 and defendants 1, 2 and 3, all got one share and mother of the plaintiff, were parties to the said family arrangement.

It was contended on behalf of the plaintiff that the property in question being the self-acquired property of Venkataswamy and he having executed a will indicating the manner in which the property will devolve, defendants 4 and 5 had no authority to enter into a family arrangement under Ext.A and, therefore, the so-called family arrangment under Ext.A is not binding on the parties and the will must be given effect to.

While disposing of the said case, the Division Bench of Orissa High Court held as follows:-

> "So far as the first point is concerned, it is almost admitted and evidence is overwhelming that neither Venkataswamy nor his brother Narasimhulu had any ancestral joint family property in their hand. By dint of their own labour and by preparing and selling country cigar both the brothers earned their livelihood and in course of time out of their own income they acquired the property in question. Undoubtedly in the property both Narasimhulu and Venkataswamy had their respective shares. But so far as the property of Venkataswamy is concerned it must be held to be his self-acquired property having been acquired out of his own endeavour and it cannot be impresed with the character of a joint family property. The property in question having been acquired by Venkataswamy out of his own exertions and without the aid of any joint family property, it must be held to be the self-aquired property of Venkataswamy. When a property is acquired by persons constituting a joint Hindu family by their joint labour, as has been done in the present case, but the same is acquired without the aid of joint family property, then it becomes the joint property of the joint acquirers and in such property, the male issues of the acquirers do not take any interest in it by birth. There

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has not been an iota of material in the present case to indicate that the property acquired by the two brothers, namely Venkataswamy and Narasimhulu was acquired with the aid of any joint family property. On the other hand, it is almost the admitted case of the parties that the property was so acquired by the endeavour of the two brothers without the aid of joint family property and, therefore, it must be held to be the joint property of the joint acquirers and consequently, the property that was in the hands of Venkataswamy must be held to be his self-acquired property"

8(d) The next case relied on by the learned counsel for the appellants is AIR 1953 SC 495 (Vol.40 CN 122) (C.N.Arunachala Mudaliar Vs. A.C.Muruganatha Mudaliar and another), wherein it has been held by the Honourable Apex Court as follows:-

"In view of the settled law that a Mitakshara father has absolute right of disposition over his self-acquired property to which no exception can be taken by his male descendants, it is in our opinion not possible to hold that such property bequeathed or gifted to a son must necessarily, and under all circumstances, rank as ancestral property in the hands of the donee in which his sons would acquire co-ordinate interest. This extreme view, whch is supposed to be laid down in the Calcutta case : vide '6 W R 71 (a)' referred to above, is sought to be supported on a two-fold ground. The first ground is the well known doctrine of equal ownership of father nd son in ancestral property which is enunciated by Mitakshara on the authority of Yagnavalkya. The other ground put forward is that the definition of "self-acquisition" as given by Mitakshara does not and cannot comprehend a gift of this character and consequently such gift cannot but be partible property as between the donee and his sons.

So far as the first ground is concerned, the foundation of the doctrine of equal ownership of father and son in ancestral property is the well known text of Yaganavalkys : vide Yagnavalkya Book 2, 129 which says:

"The ownership of father and son is co-equal in the acquisitions of the grandfather, whether land, corody or chattel."

it is to be noted that Vijnaneswar invokes this passage in Chap I, Sec. 5 of his work, where he deals with the division of gransfather's wealth amongst his grandsons. The grandsons, it is said, have a right by birth in the grandfather's estate equally with the sons and consequently are entitled to shares on partition though their shares would be determined 'per stirpes' and not 'per capita'.

This discussion has absolutely no bearing on the present question. It is undoubtedly true that according to Mitakshara, the son has a right by birth both in his father's and grandfather's estate, but it has been pointed out before, a

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distinction is made in this respect by Mitakashara itself. In the ancestral or grandfather's property in the hands of the father, the son has equal rights with his father; while in the self-acquired property of the father, his rights are unequal by reason of the father having an independent power over or predominant interest in the same : vide Mayne's Hindu Law, 11th Edition, page 338. It is obvious, however, that the son can assert this equal right with the father only when the grandfather's property has devolved upon his father and has become ancestral property in his hands. The property of the grandfather can normally vest in the father as ancestral property if and when the father inherits such property on the death of the grandfather or receives it, by partition, made by the grandfather himself during his life-time. On both these occasions the grandfather's property comes to the father by virtue of the latter's legal right as a son or descendant of the former and consequently it becomes ancestral property in his hands.

But when the father obtains the grandfather's property by way of gift, he receives it not because he is a son or has any legal right to such property but because his father chose to bestow a favour on him which he could have bestowed on any other person as well. The interest which he takes in such property must depend upon the will of the grantor. A good deal of confusion, we think, has arisen by not keeping this distinction in mind. To find out whether a property is or is not ancestral in the hands of a particular person, not merely the relationship between the original and the present holder but the mode of transmission also must be looked into; and the property can ordinarily be reckoned as ancestral only if the present holder has got it by virtue of his being a son or descendant of the original owner. The Mitakshara, we think, is fairly clear on this point. It has placed the father's gifts under a separate category altogether and in more places than one has declared them exempt from partition."

8(e) The learned counsel for the appellants would contend that in 1998(2) LW 175 (Kashuri Naidu (Died) and 6 others Vs. N.Padmanabhan and 3 others), the property purchased under the Court auction with the self earnings of a member of a joint family is considered to his self-earning property and not as a joint family since the purchase under the Court auction was not made out of the income from the joint nucleus of the Hindu Joint family. The exact observation in the above said judgment runs as follows:-

"Plaintiff has miserably failed to prove that there was any family property. Only if there is sufficient nucleus, the question of acquiring property on that basis would arise. It is seen from the evidence that there was not sufficient nucleus, nor was there any nucleus at all. Item I of C Schedule is also one of the Items included in Ex.A.1. After acquisition under Ex.A.1, and while the father was alive, Narayanaswami acquired C Schedule

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Item 2 in Court auction. Ex.A.2 proves the same. Being an acquisition by a coparcener, law presumes that it is his self-acquisition. Further, it is a court auction purchase. Law does not take cognizance of a plea that a court auction purchase is benami. Section 66 of the Code of Civil Procedure before the Amendment in the year 1976, prohibited such a contention. Apart from the same, the plaintiff has miserably failed to prove that even in regard to the purchase of the property in court auction sale, funds were provided by the family."

8(f) The learned counsel for the respondents would contend that the Sanjivaraya Koundar who had executed the settlement deed in favour of D2 in respect of the one half of his 1/3 share ie. 21 1/3 cents in suit survey number property on 10.2.1989 (Ex.B.5), had cancelled the same under Ex.A.6 dated 13.11.1990. Section 126 of the Transfer of Property Act deals with under what circumstances a gift can be revoked. Section 126 of Transfer of Property Act, runs as follows:-

"When gift may be suspended or revoked:-

The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part, at the mere will of the donor, is void wholly or in part, as the case may be.

A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded.

Save as aforesaid, a gift cannot be revoked.

Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice."

8(g) There is a reservation made in Ex.B.5 settlement deed dated 10.2.1989 by Sanjivaraya Koundar at the time of executing Ex.B.5 to the effect that it is liable to be cancelled at his will at a future point of time. Under such circumstances after executing Ex.B.5 settlement deed, which was acted upon by D2, cannot be revoked by his own volition of Sanjivaraya Koundar under Ex.A.6. So under law Ex.A.7 is nonest. Both the Courts below were under an erroneous conclusion that the property purchased by Thandavaraya Koundar, Sanjivaraya Koundar and Govinda Koundar under Ex.B.1 is a joint family property. Since there is no evidence to show that Ex.B.1 property was purchased out of the funds of the joint nucleus of the Hindu Joint family, it cannot be said that it is a joint family property. As I have already observed in the earlier paragraphs, P.W.1 himself has admitted in the cross-examination that Sanjivaraya Koundar, Govinda Koundar and Thandavaraya Koundar had no property of their own and they were doing cooly works in the others' land and out of the income earned by them, they purchased the suit schedule property and under oral partition of the said property 1/3 share fell to Sanjivaraya Koundr thereby it shall be construed only as a self acquired property of Sanjivaraya Koundar and not a joint family property as contended by the

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learned counsel for the respondents. Under such circumstances, this Court has necessarily to interfere with the findings of the Courts below. Points are answered accordingly.

9. In the result, the appeal is allowed setting aside the decree and judgment in A.S.No.39/1994 on the file of the Principal Subordinate Judge, Cuddalore and consequently the suit in O.S.No.183 of 1991 on the file of the Additional District Munsif, Cuddalore, is dismissed. In the circumstances of the case, there is no order as to costs.

Sd/
Asst.Registrar

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Sub Asst.Registrar

ssv

To,

1. The Principal Subordinate Judge, Cuddalore.
2. The Additional District Munsif, Cuddalore.
3. The Record Keeper, V.R.Section, High Court, Madras.

1 cc To Mrs.Hema Sampath, Advocate, SR.15657.

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